



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	Virginia Employment Commission
VAC Chapter Number:	16 VAC 5-10, 60, 70, and 80
Regulation Title:	Regulations Governing Unemployment Benefits
Action Title:	Final
Date:	August 2, 2002

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The amendments establish the regulatory framework to allow filing for benefits via telephone and the Internet and for conducting adjudication via the telephone. In addition, the amendments conform existing regulations to changes in state and federal law and to changes in federal and commission policy that have been adopted since the last amendments made in 1994.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On June 28, 2002, the Commissioner of the Virginia Employment Commission approved the publication of final regulations for 16 VAC 5-10, 60, 70, and 80, Regulation Governing Unemployment Benefits.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The Virginia Employment Commission (VEC) is authorized to promulgate regulations in § 60.2-111.A of the Code of Virginia in order to administer the unemployment insurance program. This section provides broad-based authority for the commission to “adopt, amend, or rescind such rules and regulations...as it deems suitable to that end.” Written assurance from the Office of the Attorney General that the commission possesses, and has not exceeded, its statutory authority to promulgate the regulation is attached.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

While the amendments are not essential to protect the health, safety, or welfare of the citizens of the Commonwealth, they are intended to make the unemployment claims and appeals processes more efficient for citizens, employers, and the agency. Currently, individuals must travel to the nearest VEC office in order to file a claim for unemployment insurance. The amendments pave the way to allow such claims to be filed via telephone or the Internet, thus eliminating travel time and expenses. Similarly, by taking unemployment claims via the telephone and Internet, VEC will achieve economies of scale by concentrating most intake staff in regional call centers rather than having sufficient intake staff to handle anticipated claims volume at each of 39 field offices.

Filing appeals vial the Internet or facsimile will reduce postage costs and speed the appeal process by reducing time in transit. Conducting appeals via telephone will reduce travel time and will allow the VEC to use its staff resources more efficiently by using that time to conduct hearings rather than traveling. The amendments also further the goals established by Executive Order 65(00), Part 2.B.

The administrative funding the VEC receives from the federal government decreases as the economy improves. However, the agency's need to maintain job services and intake staff remains fairly constant if the agency is to render a consistent level of service and be prepared to respond to local economic downturns as well as an overall economic decline. By allowing the VEC to locate many of its employees at regional centers to take claims via the telephone and Internet, the agency will be better positioned to dedicate its human resources to the greatest areas of need. This method also allows the agency greater flexibility to assign human resources in the event of a significant economic downturn.

The regulation is intended to reduce travel time and expenses for clients, employers, witnesses and the agency. It is also intended to allow the agency to concentrate resources to respond more rapidly and efficiently to local economic downturns than is possible by maintaining intake staff only at each unemployment insurance field office.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The proposed amendments would make the following changes:

- Definitions in 16 VAC 5-10-10 have been altered to reflect changes proposed for the agency's other regulations. The definitions remove references to "full service unemployment insurance office" because the agency is proposing that most claims for unemployment insurance be made via telephone and the Internet. A definition of "days" is included to specify that the use refers to consecutive calendar days unless otherwise specified. A definition of "field office" is included as a replacement for such full service offices. A definition of "ex parte communication" is included to support a prohibition on such communications in 16 VAC 5-80. A change in the name of the Interstate Conference of Employment Security Agencies is reflected in the definition of "Interstate Benefits Plan". The definition of "job service office" has been eliminated because such offices are now included in the proposed definition of "field office". A definition of "liable employer" has been added to reflect a change in 16 VAC 5-80-10 making reference to the liable employer rather than the "last 30-day employing unit" in order to provide more detail on the circumstances in which employers may be determined liable. A definition of "notification lists" has been added to support changes in the commission's public participation guidelines. A definition of "regional adjudication

center” has been added to support the agency’s proposal to centralize adjudication staff. Finally, the definition of “unemployment insurance office” has been deleted in recognition of the proposal to take most unemployment claims via telephone or the Internet.

- The agency’s public participation guidelines established in 16 VAC 5-10-20 have been amended to recognize the statutory changes eliminating the Employment Commission’s Advisory Board. The changes also establish that regulatory proposals will be published on the agency’s Internet site and on the Virginia Regulatory Town Hall. The requirement to publish notice in a Richmond newspaper would be deleted, recognizing that this publication is no longer required by the Administrative Process Act (APA). A policy for the use of ad hoc advisory committees was included as required by the APA. Instead of requiring public hearings, the regulations provide that hearings may be held. Provisions have been added to specify the means to register an interest in the commission’s regulations in order to receive notices of proposals.
- Section 16 VAC 5-10-30 has been amended to remove a specific list of agency participants in the regulatory review process; as such internal agency matters are exempt from the APA. The proposal would require the agency to review its regulations every three years as required by current executive order.
- Amendments in 16 VAC 5-60-10 increase the allowable methods of filing claims to include telephone and Internet filing. The time allotted to employers to complete information forms regarding claims is increased from five to eight calendar days. Changes allow employers to avoid filing individual reports in cases of mass separation if they provide a list of employees affected. This change also encourages reporting as soon as the details of the separation are known. Amendments would specify the procedure for claimants to cancel claims for benefits. Another change deletes language allowing individuals to report to unemployment offices other than where the claim is filed because claims will be filed via telephone and Internet. Language is proposed to specify the date of filing for claims filed by mail. Amendments would reduce the percentage of area unemployment from 20% to 15% in order for claimants to qualify for reduced work search requirements.
- A portion of 16 VAC 5-60-10 dealing with labor disputes is proposed for deletion. The paragraph deleted is obsolete and has been replaced by several pages of instructions in the VEC’s field manual. In most instances, individuals engaged in a labor dispute are ineligible for unemployment benefits. The cases in which a labor dispute may cause unemployment through no fault of the claimant are infrequent and complicated. For this reason, the agency views these cases as better handled on an individual basis using applicable case law rather than by generally applicable regulation.
- The amendments to the catch line for 16 VAC 5-60-40 change the reference “Job Training Partnership Act” to “Workforce Investment Act”.

- Section 16 VAC 5-70-10 would be amended to specify that interstate claims be submitted by mail or other means as specified by the Commission in order to allow for telephone and Internet filing.
- Section 16 VAC 5-70-20 would specify a procedure for canceling combined-wage claims.
- An amendment to 16 VAC 5-80-10 substitutes the term “liable employer” for “last 30 day employing unit”. This change is also made in 16 VAC 5-80-20.
- Amendments to 16 VAC 5-80-20 expand the means for filing appeals to include facsimile transmission and Internet filing. The amendments also specify that in most situations, hearings will be conducted by telephone, but provides that parties may request to appear in person. A requirement is added that notice of hearings be mailed at least 10 days in advance of the hearing. The Commission is permitted to call a hearing to receive evidence with respect to a request to reopen a case. In addition, amendments delineate the filing date for appeals lacking a postmark, and state a time limit for requests to rescind a withdrawal of an appeal. Amendments to this section permit parties to request that documents be admitted, provided that they are relevant to the issues in dispute. Amendments also describe the process for challenging the impartiality of the hearing officer.
- Amendments to 16 VAC 5-80-30 specify means for filing an appeal to the Commission. Additional amendments provide that Commission level hearings shall be conducted in the agency’s Richmond Office unless otherwise agreed upon, and that all parties have the right to submit a written argument in lieu of participating in an oral argument hearing. A transcript of the Appeals Examiner’s hearing will be provided to parties upon request for a Commission level hearing. The amendments also specify the means to challenge the hearing officer if a party believes that the adjudicator is biased or has a conflict of interest.
- A provision would be added to 16 VAC 5-80-40 to prohibit parties to a case from contacting the adjudicator to discuss the case without written notice to other parties and the opportunity to respond. Amendments to this section address the Commission’s approval of attorney fees, codifying current practice. One change to current practice would allow the Commission to award interim fees in limited cases.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term “issues” means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantages and disadvantages of the regulations are discussed below:

1. The primary advantages to the public are the elimination of travel time and expense in order to file a claim for unemployment benefits or to appeal a commission decision. For businesses and witnesses involved in adjudication, the regulation will allow them to participate in hearings with greater convenience. Another advantage to parties to appeals is that greater convenience for those testifying will result in more cases being decided on the best information available and on the merits of the case and fewer cases being decided by default when one of the parties fails to appear.

Some individuals may feel that telephone hearings may not provide the hearing officer with the ability to evaluate the demeanor of witnesses who testify to determine their credibility. However, witness demeanor is the least reliable of all credibility factors. The hearing officer will be better able to focus on the more reliable credibility factors such as inconsistent prior statements and the manner in which witnesses and parties answer questions.

In addition, there may be some concern that with telephone adjudication, the appellant may not have the same opportunity to confront witnesses. However, this issue has been raised and rejected by the courts on the basis that a physical confrontation is not necessary in a quasi-judicial setting such as an administrative hearing. Parties to hearings will still be able to hear others' testimony contemporaneously and to respond to that testimony.

2. The primary advantage to the agency and the Commonwealth is that the regulations will allow the agency greater flexibility to assign human resources to areas of greatest need and to address significant local economic events without having to physically relocate staff. In addition the regulations will allow the agency to take advantage of economies of scale in order to use existing resources in the event of a significant economic downturn. There are no disadvantages to the agency or the Commonwealth.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

In 16 VAC 5-60-10, the agency elected to allow claimants to continue filing claims in-person at local field offices in addition to offering claims filing via the Internet and telephone. This change was made in response to public comment. The agency also updated reference to the Administrative Process Act in response to the recodification of the Act in Title 2.2 of the Code of Virginia

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

The agency received written comments from four entities: The Virginia Poverty Law Center, Central Virginia Legal Aid Society, the U.S. Department of Labor, and from Charles A. Young. The Virginia Poverty Law Center also provided testimony at the agency's public hearing. The comments and the agency's response are as follows:

Claimants with limited English proficiency: Three of those submitting comments expressed concern about the ability of non-English speaking persons to file claims and participate in hearings via telephone. The agency has taken several steps to be able to provide effective services to individuals with limited English proficiency. Each local office has developed a catalog of local resources for providing interpreter services, including local colleges and universities, bilingual individuals on staff, refugee settlement offices and charities, and ATT Language Line. In addition, the agency has developed a statewide database of all agency bilingual employees and the languages spoken by staff.

The voice response system will provide callers with the option of receiving services in English or Spanish – the two most prevalent languages in the Commonwealth. In addition, operators with the help of contracted services from Language Line will be able to determine the caller's language and provide qualified interpreters. While language line interpreters may not be expert in unemployment insurance programs, most English-speaking claimants cannot be assumed to be knowledgeable about the programs. It is this agency's responsibility and policy to provide assistance and due process regardless of the claimants' language or level of program expertise.

It should be noted that issues related to claimants with limited English proficiency would be similar whether initial contact is made in person or via telephone or the Internet. Individuals with limited English proficiency may still contact local offices in person to obtain interpreter services and for assistance in filing claims. In practice, many individuals with limited English proficiency who speak languages that may not be readily recognizable already use an English-speaking sponsor or family member to contact government services. While these individuals are not assumed to be qualified to provide interpreter services for the claimant, they can help direct staff to the appropriate language so that qualified interpreters can be obtained.

Although neither the VEC's current nor proposed regulations specifically addresses the provision of services to individuals with limited English proficiency, the VEC has always been bound by Title IV of the Civil Rights Act, prohibiting discrimination on the grounds of race, color, or national origin. The agency is in full compliance with the U.S. Department of Labor's Policy Guidance on the Prohibition Against National Origin Discrimination as it Affects Persons with Limited English Proficiency, and intends to continue full compliance under the call center system.

In-person claims filing: Three of those submitting comments suggested that the option of filing claims in-person at local offices be maintained. The VEC agrees that those individuals who would like to visit VEC local offices in order to file claims should be able to do so. Therefore, the agency has eliminated language in the proposed regulations stating that unemployment insurance claim filing and processing will be available only by telephone. Local offices will

continue to provide claims intake so that citizens can choose between telephone, Internet, and in-person filing. 16 VAC 5-60-10.A

Maintain local offices: Two of those submitting comments expressed concern that the regulations may contemplate closing local employment service offices. The agency agrees that the local availability of employment service offices provides access to job service opportunities, to local job testing, and to local employers. Under the Workforce Investment Act, the VEC remains committed to increasing the availability of locally-designed and delivered employment services and in recent years has been supplementing both the number of offices and the range of services available through the establishment of local One-Stop centers under the burgeoning Virginia Workforce Network. The regulations do not contemplate reducing the local presence of the VEC or the local availability of job services. 16 VAC 5-60-10.A

In-person appeal hearings: Three of those commenting suggested that the agency clarify that in-person hearing are available upon the request of any party. Section 5-80-10.B.2 clearly states “[a]ny person who desires to appear in person for the hearing shall be permitted to do so provided a timely request is received by the commission. A request shall be deemed timely if it is received by the commission before the scheduled hearing convenes.” Language in 5-80-10.B.1 relates to the Commission’s discretion to schedule a split or in-person hearing without a request by a party and does not override the ability of any party to request to appear in-person. 16 VAC 5-80-10.B

Definition of timely adjudication: One person suggested that a definition of “timely adjudication” be added to provide a limit of one-year in non-fraud cases. The agency has elected not to make this change. A one-year definition of “timely adjudication” would be too long in most cases. In some limited cases, timely adjudication may take longer as the facts and circumstances dictate. The agency does not feel that the public’s best interests will be served by adopting the proposed definition. 16 VAC 5-10-10

Adopt a time limit for canceling claims: One person suggested that the agency specify how much time can elapse before a claim is cancelled. The agency has elected not to make this change. In some cases, the unemployment claim is decided after other legal actions between parties have been resolved. Making the decision of the appropriate time limit for canceling a claim on a case-by-case basis retains discretion and flexibility in these cases. 16 VAC 5-60-10.D

Specify local offices as sites for in-person or split hearings: One person suggested that the agency specify that local offices are the sites for in-person hearings. The agency has elected not to make this change. While most local offices provide suitable sites for hearings, the reasons for requesting an in-person hearing locally may preclude the use of some offices or may require the agency to make other arrangements. For this reason, the agency would prefer to retain the flexibility to make arrangements best suited to the situation at hand. 16 VAC 5-80-20.B.1

Rescinding the withdrawal of claims: One person suggested that the agency specify a time limit in which to rescind the withdrawal of a claim. The agency has elected not to make this change. The agency’s decision whether to allow a claimant who has withdrawn a claim to rescind the withdrawal is fact-based and made on a case-by-case basis. 5-80-20.E.3

Limiting observers: One person suggested that parties should not be able to object to the presence of observers at hearings and objects to language in 16 VAC 5-80-20 (F)(3) that permits observers if there is no objection by a party. The agency feels that this language is necessary in order to comply with federal confidentiality requirements. 16 VAC 5-80-20.F.3

Implementing telephone hearings at the commission appeal level: One person suggested that rather than having telephone hearings upon the consent of all interested parties, that the regulations should allow each party to determine whether he wishes to participate in-person or via telephone. The agency is implementing the policy of allowing parties to participate via telephone upon consent on a trial basis. Depending on the outcome of this trial, the agency will consider future regulatory changes to allow parties to participate via telephone without requiring consent from other parties. 16 VAC 5-80-30.G

Specify that sending materials satisfies subpoena: One person suggested that the agency specify in its regulations that in the case of material, sending the material via mail, Internet or facsimile satisfies the subpoena. The agency intends to address this issue administratively in written subpoena notices. 16 VAC 5-80-40.B

Attorney fees in cases involving more than one claim: One person asked about the approval of attorney fees in cases in which the claimant has more than one claim – would attorney fees be limited to 25% of the maximum benefit amount for the last current claim? It has been the agency’s practice to limit attorney fees for appeals involving multiple claims to no more than 25% of the maximum benefit amount for the last current claim. 16 VAC 5-80-20.E.3

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

The proposed amendments would make the following changes:

- Definitions in 16 VAC 5-10-10 have been altered to reflect changes proposed for the agency’s other regulations. The definitions remove references to “full service unemployment insurance office” because the agency is proposing that most claims for unemployment insurance be made via telephone and the Internet. A definition of “field office” is included as a replacement for such full service offices. A definition of “*ex parte* communication” is included to support a prohibition on such communications in 16 VAC 5-80. A change in the name of the Interstate Conference of Employment Security Agencies is reflected in the definition of “Interstate Benefits Plan”. The definition of “job service office” has been eliminated because such offices are now included in the

proposed definition of “field office”. A definition of “liable employer” has been added to reflect a change in 16 VAC 5-80-10 making reference to the liable employer rather than the “last 30-day employing unit” in order to provide more detail on the circumstances in which employers may be determined liable. A definition of “regional adjudication center” has been added to support the agency’s proposal to centralize adjudication staff. Finally, the definition of “unemployment insurance office” has been deleted in recognition of the proposal to take most unemployment claims via telephone or the Internet.

- The agency’s public participation guidelines established in 16 VAC 5-10-20 have been amended to recognize the statutory changes eliminating the Employment Commission’s Advisory Board. The changes also establish that regulatory proposals will be published on the agency’s Internet site and on the Virginia Regulatory Town Hall. The requirement to publish notice in a Richmond newspaper would be deleted, recognizing that this publication is no longer required by the Administrative Process Act (APA). A policy for the use of ad hoc advisory committees was included as required by the APA. Instead of requiring public hearings, the regulations provide that hearings may be held.
- Section 16 VAC 5-10-30 has been amended to remove a specific list of agency participants in the regulatory review process; as such internal agency matters are exempt from the APA. The proposal would require the agency to review its regulations every three years as required by current executive order.
- Amendments in 16 VAC 5-60-10 increase the allowable methods of filing claims to include telephone and Internet filing. The amendments also provide that when telephone claim filing is available, it shall become the preferred method for filing claims. The time allotted to employers to complete information forms regarding claims is increased from five to eight calendar days. Changes allow employers to avoid filing individual reports in cases of mass separation if they provide a list of employees affected. This change also encourages reporting as soon as the details of the separation are known. Amendments would specify the procedure for claimants to cancel claims for benefits. Another change deletes language allowing individuals to report to unemployment offices other than where the claim is filed because claims will be filed via telephone and Internet. Language is added to specify the date of filing for claims filed by mail. Amendments would reduce the percentage of area unemployment from 20% to 15% in order for claimants to qualify for reduced work search requirements.
- A portion of 16 VAC 5-60-10 dealing with labor disputes is proposed for deletion. The paragraph deleted is obsolete and has been replaced by several pages of instructions in the VEC’s field manual. In most instances, individuals engaged in a labor dispute are ineligible for unemployment benefits. The cases in which a labor dispute may cause unemployment through no fault of the claimant are infrequent and complicated. For this reason, the agency views these cases as better handled on an individual basis using applicable case law rather than by generally applicable regulation.

- The amendments to the catch line for 16 VAC 5-60-40 change the reference “Job Training Partnership Act” to “Workforce Investment Act”.
- Section 16 VAC 5-70-10 would be amended to specify that interstate claims be submitted by mail or other means as specified by the Commission in order to allow for telephone and Internet filing.
- Section 16 VAC 5-70-20 would specify a procedure for canceling combined-wage claims.
- An amendment to 16 VAC 5-80-10, substitutes the term “liable employer” for “last 30 day employing unit”.
- Amendments to 16 VAC 5-80-20, expand the means for filing appeals to include facsimile transmission and Internet filing. The amendments also specify that in most situations, hearings will be conducted by telephone, but provides that parties may request to appear in person. A requirement is added that notice of hearings be mailed at least 10 days in advance of the hearing. The Commission is permitted to call a hearing to receive evidence with respect to a request to reopen a case. In addition, amendments delineate the filing date for appeals lacking a postmark, and state a time limit for requests to rescind a withdrawal of an appeal. Amendments permit parties to request that documents be admitted, provided that they are relevant to the issues in dispute. Amendments describe the process for challenging the impartiality of the hearing officer.
- Amendments to 16 VAC 5-80-30 specify means for filing an appeal to the Commission. Amendments provide that Commission level hearings shall be conducted in the agency’s Richmond Office unless otherwise agreed upon, and that all parties have the right to submit a written argument in lieu of participating in an oral argument hearing. A transcript of the Appeals Examiner’s hearing will be provided to parties upon request for a Commission level hearing. The amendments also specify the means to challenge the hearing officer if a party believes that the adjudicator is biased or has a conflict of interest.
- A provision would be added to 16 VAC 5-80-40 to prohibit parties to a case from contacting the adjudicator to discuss the case without written notice to other parties and the opportunity to respond. Amendments address the Commission’s approval of attorney fees, codifying current practice. One change to current practice would allow the Commission to award interim fees in limited cases.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for

oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulation will support family stability among unemployed individuals by not requiring the use of scarce resources to travel to VEC field offices in order to submit unemployment claims or to participate in hearings. The regulation will have no impact on the authority and rights of parents. The regulation may encourage self-sufficiency among the unemployed to the extent that it does not require scarce family resources to be used in order to file an unemployment claim. The regulation will neither strengthen nor erode marital commitment. The regulation will prevent a decrease in disposable family income among the unemployed to the extent that resources need not be expended in travel to file claims or attend hearings.